IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-5412

JOHN R. DILLARD and WILLIE WILLIAMS, individually, and on behalf of all other persons similarly situated,

Appellants,

v.

INDUSTRIAL COMMISSION OF VIRGINIA, THOMAS M. MILLER, Chairman, Industrial Commission of Virginia, M. EDWARD EVANS, ROBERT P. JOYNER, Commissioners of the Industrial Commission of Virginia, and AETNA CASUALTY AND SURETY COMPANY,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

BRIEF FOR THE APPELLANTS

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TABLE OF CONTENTS

	Page
OPINION BELOW	1
JURISDICTION	2
QUESTION PRESENTED	2
STATUTES INVOLVED	2
STATEMENT	4
SUMMARY OF ARGUMENT	7
ARGUMENT:	
I. The Discontinuance of Workmen's Compensation Benefits Is State Action Within the Fourteenth Amendment	8
II. Workmen's Compensation Benefits Are Property Within the Meaning of the Due Process Clause	13
III. Deprivation of Property Must be Preceded by Due Process	14
IV. Only a Prior Evidentiary Hearing Will Satisfy Due Process Since the Injured Worker's Interest Far Outweighs Any Other Interests	18
CONCLUSION	26

TABLE OF AUTHORITIES

Cases:

Armstrong v. Manzo, 380 U.S. 545 . . . . . 16, 17

Bell v. Burson, 402 U.S. 535 . . . . . 14, 15, 17

Board of Regents of State Colleges v. Roth, 408 U.S. 564 . . . . . 7, 13, 17, 21

Burlington Mills Corp. v. Hagood, 177 Va. 204, 13 S.E.2d 291 (1941) 14

	Page
Burton v. Wilmington Parking Authority, 365 U.S. 715	7, 10, 13
Cafeteria and Restaurant Workers Union Local 743, AFL-CIO v. McElroy, 367 U.S. 886	8, 18
Coffin Bros. & Co. v. Bennett, 277 U.S. 29	17
Columbia Broadcasting System v. Democratic National Committee, 412 U.S. 94	10
Dillard, Etc. v. Industrial Commission of Virginia, 409 U.S. 238	5
Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594	17
Fuentes v. Shevin, 407 U.S. 67	*passim*
Gobble v. Clinch Valley Lumber Co., 141 Va. 303, 127 S.E. 175 (1925)	8
Goldberg v. Kelly, 397 U.S. 254	*passim*
J.A. Foust Coal Co. v. Messer, 195 Va. 762, 80 S.E.2d 533 (1954)	24
Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123	26
Manchester Board and Paper Co. v. Parker, 201 Va. 328, 111 S.E.2d 453 (1959)	7, 9, 10
Marsh v. State of Alabama, 326 U.S. 501	10, 11
McCabe v. Atchison, T. & S.F.R. Co., 235 U.S. 157	13
Moose Lodge No. 197 v. Irvis, 407 U.S. 173	10
Morgan v. United States, 304 U.S. 1	26
Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306	10
North American Cold Storage v. City of Chicago, 211 U.S. 306	17
Opp Cotton Mills v. Administrator, 312 U.S. 126	16
Ownbey v. Morgan, 256 U.S. 94	17

Page

Public Utilities Comm. v. Pollak, 343 U.S. 451 10

Smith v. Allwright, 321 U.S. 649 . . . . . 10, 12, 13

Sniadach v. Family Finance Corporation of Bay View, 395 U.S. 337 . . . . . 10, 14, 15, 17, 20, 23

Speiser v. Randall, 357 U.S. 513 12

Stanley v. Illinois, 405 U.S. 645 . . . . . 15, 22

United States v. Illinois Central Railroad Co., 291 U.S. 457 . . . . . 15, 18

Virginia Used Auto Parts, Inc. v. Robertson, 212 Va. 100, 181 S.E.2d 612 (1971) 9

Weber v. Aetna Casualty & Surety Company, 406 U.S. 164 12

Wisconsin v. Constantineau, 400 U.S. 433 15

United States Statutes

28 U.S.C. Section 1253 2
28 U.S.C. Section 2101(b) 2
29 U.S.C. Sections 201 et seq. 16
42 U.S.C. Sections 601 et seq. 19
42 U.S.C. Section 607 19
42 U.S.C. Sections 1201 et seq. 19
42 U.S.C. Sections 1351 et seq. 20
42 U.S.C. Sections 1381 et seq. 19

Virginia Statutes

Code of Virginia of 1950, as amended:

Sections 38.1-7, 218-279 9
Section 63.1-88 . . . . . 14, 19
Section 63.1-106 20
Section 65.1-18 9
Section 65.1-36 11
Section 65.1-54 . . . . . 9, 11, 19
Section 65.1-55 9

	Page
Section 65.1-60	9
Section 65.1-63	24
Section 65.1-65	9
Section 65.1-72	12
Section 65.1-73	12
Section 65.1-75.1	12
Section 65.1-81	14
Section 65.1-82	11, 14, 19
Section 65.1-88	11, 24
Section 65.1-93	9, 23
Section 65.1-94	25
Section 65.1-99	3, 5, 20
Section 65.1-103	9
Section 65.1-106	9
Section 65.1-113	9, 11
Acts of Assembly, 1918, p. 637	8

Virginia Regulations

Rules of the Industrial Commission of Virginia, Rule 13	*passim*
Volume II, Manual of Policy and Procedure, Virginia Department of Welfare and Institutions, Section 304.3B	19

Opinions of Industrial Commission of Virginia

Baker v. Fairfax County School Board, 53 OIC 11 (August 5, 1971)	24
Charles v. Aileen, Inc., 53 OIC 35 (August 25, 1971)	24
Collins v. Carpenter Construction Co., 53 OIC 43 (August 24, 1971)	24
Dowell v. Pulaski Furniture Corp., 53 OIC 84 (May 11, 1971)	24
McAdoo v. Meadowbrook County Club, 53 OIC 175 (April 22, 1971)	24

Page

Miscellaneous

Constitution of the United States, Amendment 14, Section 1 2

Davis, *Administrative Law Treatise* (1958), Section 7.06 16

The Persecution and Intimidation of The Low Income Litigant as Performed by the Small Claims Court in California, 21 Stanford L.R. 1657 (1969) 23

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OPINION BELOW

The opinion of the three-judge District Court for the Eastern District of Virginia of July 17, 1972 (App. 46-65), which has been reinstated, is reported at 347 F.Supp. 71.

JURISDICTION

The judgment of the District Court was entered on June 26, 1973. (App. 87) The Notice of Appeal was filed in the District Court on July 26, 1973. The Jurisdictional Statement was filed on September 10, 1973, and probable jurisdiction was noted on December 17, 1973. The jurisdiction of this Court rests on 28 U.S.C. §§1253 and 2101(b).

QUESTION PRESENTED

Whether, under the workmen's compensation scheme in the State of Virginia, the discontinuance of workmen's compensation benefits to injured workers without notice and the opportunity for a prior evidentiary hearing, violates due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States?

STATUTES INVOLVED

I.

Amendment XIV, Section 1, Constitution of the United States:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are Citizens of the United States and of the state wherein they reside . . . nor shall any state deprive any person of life, liberty or property, without due process of law . . .

II.

Section 65.1-99, Code of Virginia of 1950, as amended:

§65.1-99. Review of award on change in condition. Upon its own motion or upon the application of any party in interest, on the ground of a change in condition, the Industrial Commission may review any award and on such review may make an award ending, diminishing or increasing the compensation previously awarded, subject to the maximum or minimum provided in this Act, and shall immediately send to the parties a copy of the award. No such review shall affect such award as regards any moneys paid but no such award shall be made after twelve months from the last date for which compensation was paid, pursuant to an award under this Act, except thirty-six months from the last day for which compensation was paid shall be allowed for the filing of claims payable under §65.1-56.

III.

Rule 13 of the Rules of the Industrial Commission of Virginia, as amended on April 1, 1972:

Applications for Review on Ground of Change in Condition.—Applications for review under §65.1-99 of the Act must be in writing and state the ground relied upon for relief. Reviews of awards on the ground of a change in condition shall be determined as of the date of the filing of the application in the offices of the Commission, except as provided in paragraphs two and three hereof.

All applications for hearing by an employer or insurer under §65.1-99 shall show the date through which compensation benefits have been paid. No applications shall be considered by the Commission until all compensation under the outstanding award has been paid to the date such application is filed with the Commission. Except, that in any case in which the employee has actually returned to work

or has refused employment (§65.1-63), medical attention (§65.1-88), or medical examination (§65.1-91), compensation may be terminated as of the date the employee returned to work or refused employment, medical attention or medical examination, or as of a date fourteen days prior to the date the application is filed, whichever is later. In such cases the application will be considered and determined as of the date of return to work, or refusal, or as of a date fourteen days prior to the date the application is filed, whichever is later. All applications by an employer or insurer shall be under oath and shall not be deemed filed and benefits shall not be suspended until the supporting evidence which constitutes a legal basis for changing the existing award shall have been reviewed by the Commission, or such of its employees as may be designated for that purpose, and a determination made that probable cause exists to believe that a change in condition has occurred.

All applications for hearing by an employee on the ground of further work incapacity shall be considered and determined as of the date incapacity for work actually begins, or as of a date fourteen days prior to the date the application is filed, whichever is later.

STATEMENT

A. John R. Dillard

On March 15, 1971 appellant Dillard was injured on his job. (App. 12). Appellee Industrial Commission of Virginia (hereinafter referred to as the Commission), on April 7, 1971, approved an agreement appellant had entered into with his employer and appellee Aetna Casualty and Surety Company (hereinafter referred to as

Aetna) for the payment of workmen's compensation in the amount of $40.80 per week. (App. 11) On June 3, 1971, Mr. Dillard's $40.80 per week compensation was discontinued upon Aetna's filing an Application for Hearing pursuant to Section 65.1-99, Code of Virginia of 1950, as amended, and Rule 13 of the Rules of the Commission. (App. 12) Aetna alleged in its Application for Hearing that Mr. Dillard's condition had changed and that he was no longer disabled. The hearing was held on July 16, 1971, and the decision by the Commission on August 25, 1971, found him still unable to work and directed that compensation be resumed. (App. 13-16)

On September 16, 1971 Aetna filed for another hearing alleging that Mr. Dillard had refused medical treatment, and again his compensation was discontinued. (App. 17) This suit was filed on October 19, 1971, and Mr. Dillard's compensation was again resumed.

On March 21, 1972 the Commission amended Rule 13 to require an *ex parte* determination by it "that probable cause exists to believe that a change of condition has occurred" before it would allow benefits to be suspended pending a hearing. (App. 44-45)

On July 17, 1972 the three-judge district court found that, in the context of workmen's compensation benefits, due process was sufficiently satisfied if there was "at some stage an opportunity for a hearing," (App. 55) and dismissed appellant's action, Merhige, J. dissenting. On August 8, 1972 the Commission entered an Order approving a lump-sum settlement of Mr. Dillard's individual claim for compensation. (App. 24-25) On December 11, 1972 this Court vacated the judgment of the District Court and remanded the case to the District Court for consideration of mootness. *Dillard, Etc. v. Industrial Commission of Virginia*, 409 U.S. 238.

B. Willie Williams

On April 14, 1972 appellant Williams was injured in the course of his employment. The Commission, on May 11, 1972, approved an agreed upon award of $55.92 per week as workmen's compensation benefits. On October 10, 1972 Travelers Insurance Company, insurer of Williams' employer, sent to the Commission, under Amended Rule 13, an Application for a Hearing. (App. 75) Mr. Williams' compensation was discontinued on October 11, 1972. (App. 75) On October 13, 1972 the Commission made its *ex parte* determination under Rule 13 that probable cause existed to believe that Williams' condition had changed. (App. 75) On December 15, 1972 the hearing was held by the Commission at which it was determined that further medical evidence was needed.

On January 22, 1973 Williams moved to intervene in this case. On February 7, 1973, he received back benefits from October 11, 1972 to January 18, 1973, after his counsel had informed the Commission that his benefits had been suspended (October 11, 1972) in violation of Rule 13, as amended, since the "probable cause" determination had taken place on October 13, 1972, 2 days *after* his benefits had been suspended. (App. 81-82)

On February 7, 1973 Mr. Williams agreed to receive partial disability benefits to be figured retroactively to January 18, 1973. (App. 79-80) On April 17, 1973, upon application to the Commission by Travelers Insurance Company, probable cause was again found and his partial disability benefits were suspended. On June 20, 1973 a hearing was held and on July 23, 1973 the Commission ruled that Williams was no longer eligible for benefits. On December 21, 1973 the Supreme Court of Virginia refused to review the Commission's decision.

On June 26, 1973 the District Court granted Mr. Williams' motion for intervention and declared this case to be a class action and not moot. The Court also reinstated the majority and dissenting opinions of July 17, 1972, dismissing the action. (App. 87-89)

SUMMARY OF ARGUMENT

I. The Virginia workmen's compensation system is a comprehensive scheme, under which all of the parties are forced to act, or not to act, according to detailed laws and regulations. The State has given insurers and employers "legal sanction", *Manchester Board and Paper Co. v. Parker*, 201 Va. 328, 331, 111 S.E.2d 453, 456 (1959), to discontinue benefits pursuant to Rule 13. Since workmen's compensation is entirely a creature of state statutes, therefore, under the principles set out in *Burton v. Wilmington Parking Authority*, 365 U.S. 715, the actions of insurers and employers in discontinuing benefits pending a hearing are "state action" within the meaning of the Fourteenth Amendment.

II. An injured worker relies heavily on his workmen's compensation benefits to meet the needs of daily living. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564. His entitlement to workmen's compensation benefits under the laws of Virginia bring such benefits within the meaning of "property" in the Fourteenth Amendment. *Goldberg v. Kelly*, 397 U.S. 254.

III. The Court has traditionally found that, absent extraordinary circumstances necessitating prompt action, due process must be afforded prior to the deprivation. *Fuentes v. Shevin*, 407 U.S. 67. There are no exceptional circumstances requiring the precipitous discontinuance of workmen's compensation benefits.

IV. The potential harm visited on an injured worker and his family by a suspension of benefits while he is still physically unable to work is of such a magnitude that it clearly outweighs the greater expense to insurers, employers or the general public of affording prior evidentiary hearings. Since the Court has traditionally balanced the interests of the opposing parties to determine what process is due, *Cafeteria and Restaurant Worker Union, Local 743, AFL-CIO v. McElroy*, 367 U.S. 886, it is clear that in the workmen's compensation context only a prior evidentiary hearing will satisfy the dictates of due proces. The individualized factual issues, very often of a medical nature, which determine whether a worker is still eligible for benefits, are not susceptible to *ex parte*, one-sided determinations now in effect under Rule 13. Due process in this context requires, at the very least, notice and the opportunity to be heard in defense of one's interests prior to their discontinuance. *Goldberg v. Kelly*, 397 U.S. 254.

ARGUMENT

I.

THE DISCONTINUANCE OF WORKMEN'S COMPENSATION BENEFITS IS STATE ACTION WITHIN THE FOURTEENTH AMENDMENT

The first Virginia Workmen's Compensation Act was enacted in 1918, *Acts of Assembly, 1918*, p. 637, in response to the widely felt need to change the common law defenses to tort actions brought by workers injured in industrial accidents. *Gobble v. Clinch Valley Lumber Co.*, 141 Va. 303, 305, 127 S.E. 175, 176 (1925). The state did not merely abrogate the unjust defenses in the existing tort actions; rather the legislature created a

comprehensive scheme to insure that workers were compensated for disability or death arising out of and in the course of their employment. The Virginia Workmen's Compensation Act (Title 65.1 of the Code of Virginia of 1950, as amended) (hereinafter referred to as Act) controls virtually every aspect of the problem of compensation for injured workers: from how much compensation is to be paid, Sections 65.1-54, 55, 60 and 65; to what forms can be used, Section 65.1-113; and what rates insurers can charge employers for workmen's compensation coverage, Sections 38.1-7, 218-279.

An employer who comes within the purview of the Act has no choice as to whether he will participate. Sections 65.1-103 through 106, Code of Virginia of 1950, as amended; *Virginia Used Auto Parts, Inc. v. Robertson*, 212 Va. 100, 181 S.E.2d 612 (1971). Each award of compensation, even when it is agreed to by all the parties, must be approved by the Commission, and then only when the Commission "is clearly of the opinion that the best interests of the employee or his dependents will be served thereby." Section 65.1-93, Code of Virginia of 1950, as amended.

Quite early in the administration of this system of compensation the Commission became aware of the problem of employers arbitrarily terminating awards, and the Commission, under the authority of Section 65.1-18, Code of Virginia of 1950, as amended, promulgated Rule 13. *Manchester Board and Paper Co. v. Parker*, 201 Va. 328, 331, 111 S.E.2d 453, 456 (1959):

> One of its [Rule 13's] purposes was to eliminate the result which took place in this case, that is, the arbitrary discontinuance of compensation by the employer and the insurance carrier *without legal sanction.* (emphasis added)

The procedures now set out in Rule 13 give "legal sanction" to the discontinuance of workmen's compensation benefits pending a hearing.

As was the case in *Public Utilities Comm. v. Pollak*, 343 U.S. 451, in Virginia the regulatory agency, and even the highest court of the state, have "affirmatively approved the practice of the regulated entity," *Moose Lodge No. 197 v. Irvis*, 407 U.S. 163, 175-176, n. 3, of discontinuing benefits pending a hearing on the issue of fact when it believes the worker is no longer disabled. Since the workmen's compensation system is entirely a creature of the state, and all the parties to it are controlled by its laws and regulations, clearly the State of Virginia has more than a "symbiotic relationship" and is even more than a "partner" with the insurers and employers. *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 723-725; cf. *Columbia Broadcasting System v. Democratic National Committee*, 412 U.S. 94, 119-120.

The appellees throughout this litigation have, as has the majority opinion of the District Court, tried to characterize the issue in this case as a dispute between two private parties. The mere fact that the adversaries in a given case are private parties has not barred this Court from finding that due process attaches under the Fourteenth Amendment. See e.g. *Fuentes v. Shevin*, 407 U.S. 67; *Sniadach v. Family Finance Corp.*, 395 U.S. 337; and *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306. As shown above, the employer or the insurer is not acting as a private party, but as an instrumentality of Virginia's workmen's compensation laws, and with its "legal sanction". *Manchester Board and Paper Co. v. Parker*, 201 Va. 328, 331, 111 S.E.2d 453, 456 (1959). Cf. *Marsh v. State of Alabama*, 326 U.S. 501, 507; *Smith v. Allwright*, 321 U.S. 649, 663. They have no freedom

to act under the law in any other way. When they file for a hearing under Rule 13 and discontinue the injured worker's benefits, they are acting pursuant to the statutory scheme which requires that payments be made only during incapacity. Section 65.1-54, Code of Virginia of 1950, as amended. They can no more legally pay benefits to a worker who is no longer injured than they can pay more than the amount specified in the Act, since every contract of employment, Section 65.1-36 Code of Virginia of 1950, as amended, and contract of insurance, Section 65.1-113, Code of Virginia of 1950, as amended, is subject to the provisions of the Act.

The roles played by employers and insurers in the workmen's compensation system have none of the attributes of private parties. They are performing "a public function", *Marsh v. State of Alabama*, 326 U.S. 501, 507, in the strictest sense. The public function they are performing is essentially the same as that performed by government officials in the public welfare, Social Security, or unemployment compensation systems. They are administering funds which the state has directed to be accumulated and disbursed according to explicit and detailed statutes and regulations. Section 65.1-82, Code of Virginia of 1950, as amended, treats workmen's compensation benefits in the same manner as welfare benefits under Section 63.1-88, Code of Virginia of 1950, as amended, making them both unassignable and exempt from claims of creditors. The state chose, in the workmen's compensation system, to have the funds collected through insurance premiums or retained earnings rather than a tax and administered by private parties rather than a state bureaucracy; but these differences in form cannot take the underlying basic state action outside of the scope of the Fourteenth Amend-

ment. Public funds are not ultimately something different from private funds. The controlling consideration, in this context, is whether the funds are free to be used for private, non-governmental purposes, or whether their use is controlled and directed by the State for a public purpose. *Smith v. Allwright*, 321 U.S. 649, 663.

This Court has recently held in *Weber v. Aetna Casualty & Surety Company*, 406 U.S. 164, that the explicit statutory denial of workmen's compensation benefits to dependent, unacknowledged illegitimates violates the Equal Protection Clause of the Fourteenth Amendment. Therefore, there could be no possibility of questioning state action in the instant case if the statute or regulation explicitly directed benefits be discontinued upon the filing of an Application for a Hearing. But this Court has never allowed a state to do by indirection that which it could not constitutionally do directly. *Smith v. Allwright, supra, Speiser v. Randall*, 357 U.S. 513, 526. It is clear that after *Weber*, Louisiana could not allow insurance companies to write into their workmen's compensation contracts and enforce the prohibited exclusion. The Constitution cannot be so easily circumvented. Here the Industrial Commission cannot evade the strictures of the Fourteenth Amendment by merely not articulating that which is clearly mandated by the workmen's compensation scheme. When and under what conditions benefits shall be paid are integral parts of the state workmen's compensation system. Section 65.1-75.1, Code of Virginia of 1950, as amended, (20% penalty for failure to pay within two weeks of when due); Section 65.1-73, Code of Virginia of 1950, as amended, (Commission discretion to allow monthly or quarterly payments); Section 65.1-72, Code of Virginia of 1950, as amended, (Commission must approve all

awards of compensation). When workmen's compensation benefits are discontinued in compliance with Rule 13 pending a hearing on whether the worker is in fact still disabled, it is clearly "state action which compels" the employers and insurers to do it. *Smith v. Allwright*, 321 U.S. 649, 664.

At least since 1914 in *McCabe v. Atchison, T. & S.F.R. Co.*, 235 U.S. 151, this Court has not allowed a state to evade constitutional scrutiny by merely giving to private parties the power to act under a scheme in which it is massively involved. See also *Smith v. Allwright, supra; Burton v. Wilmington Parking Authority*, 365 U.S. 715.

II.

WORKMEN'S COMPENSATION BENEFITS ARE PROPERTY WITHIN THE MEANING OF THE DUE PROCESS CLAUSE

In *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, the question of what were the attributes of property interests protected by procedural due process was given extended treatment.

> It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.

Board of Regents of State Colleges v. Roth, supra at 577. In *Goldberg v. Kelly*, 397 U.S. 254, 262, it was found that public welfare benefits were "a matter of statutory entitlement for persons qualified to receive them. Their termination involves state action that adjudicates important rights."

There can be little doubt that workmen's compensation benefits for an injured worker are a "claim", "statutory entitlement" or "right" of such importance that they are protected by due process. The Virginia statutory scheme treats them as somewhat similar to wages, cf. *Sniadach v. Family Finance Corporation*, 395 U.S. 337, in that Section 65.1-81, Code of Virginia of 1950, as amended, gives them the same preference or priority "as allowed by law for any unpaid wages for labor", see also *Burlington Mills Corp. v. Hagood*, 177 Va. 204, 209, 13 S.E.2d 291, 293 (1941); and as somewhat similar to welfare, cf. *Goldberg v. Kelly, supra*, in that Section 65.1-82, Code of Virginia of 1950, as amended, gives workmen's compensation benefits virtually the same exemption from the reach of creditors as is given to public welfare benefits. Section 63.1-88, Code of Virginia of 1950, as amended. It cannot be argued that the interest a disabled worker has in his workmen's compensation benefits is of less importance than the drivers license to which due process applies. *Bell v. Burson*, 402 U.S. 535. Whether workmen's compensation benefits are considered to be traditional property rights, statutory entitlements, or important interests, it is clear that the reasons for granting procedural due process apply.

III.

DEPRIVATION OF PROPERTY MUST BE PRECEDED BY DUE PROCESS

Once it is determined that a property interest is within the terms of the Fourteenth Amendment, any taking of that interest by state action must meet the requirements of due process.

The decisions in this area indicate that, absent exceptional circumstances, due process must be provided before any deprivation takes effect. In *Fuentes v. Shevin*, 407 U.S. 67, 82, this Court stated:

> . . . the Court has traditionally insisted that, whatever its form, opportunity for that hearing must be provided before the deprivation at issue takes effect.

Even a temporary, non-final deprivation must be preceded by an opportunity to be heard, since its temporary nature does not change the fact of deprivation itself. *Fuentes v. Shevin, supra* at 82. See also *Bell v. Burson*, 402 U.S. 535, 542; *Sniadach v. Family Finance Corporation at Bay View*, 395 U.S. 337, 339; and *United States v. Illinois Central Railroad Co.*, 291 U.S. 457, 463.

There are two basic reasons which the Court has found to give rise to this principle. One reason is,

> the high value, embedded in our constitutional and political history, that we place on a person's right to enjoy what is his, free of governmental interference.

Fuentes v. Shevin, supra at 81. This importance our system gives to protecting an individual citizen's liberty and property has dictated that there be a prior notice and hearing before such diverse situations as prohibiting sale of intoxicating beverages to suspected alcoholics, *Wisconsin v. Constantineau*, 400 U.S. 433, terminating welfare benefits, *Goldberg v. Kelly*, 397 U.S. 254, and allowing garnishment of wages in satisfaction of a debt, *Sniadach v. Family Finance Corporation of Bay View*, 395 U.S. 337.

Second, this Court has traditionally refused to adopt the view that a wrong may be done simply because it may be undone at a later time. *Stanley v. Illinois*, 405 U.S. 645, 647, *Fuentes v. Shevin*, 407 U.S. 67, 82. Conse-

quently, it has consistently chosen, in the absence of extraordinary circumstances, to require due process prior to the proposed deprivation, rather than to merely require a later hearing to see if it is necessary to correct a mistaken or improper deprivation. It is the deprivation itself, not its consequent severity or length of time, that is proscribed by the Constitution, *Fuentes v. Shevin, supra* at 84-85, so that in order to be meaningful, the due process must come at a time when the wrongful deprivation can be prevented, not when all that can be done is to right the wrong. *Armstrong v. Manzo*, 380 U.S. 545, 551.

There are two situations in which individuals may be deprived of property interests prior to their opportunity to be heard in defense of those interests. One involves the legislative or rule making due process, as opposed to the adjudicative or judicial due process involved in this case. Despite the fact that one's property interests may be at stake, a legislature or rule making body is not required by Due Process to consult each and every interested party before acting, since the hearings that they hold serve only to inform the rule-making agency of facts, concepts and other matters helpful to the formation of policy and the promulgation of rules. Davis, *Administrative Law Treatise* (1958), Section 7.06. Consequently, in *Opp Cotton Mills v. Administrator*, 312 U.S. 126, relied upon heavily by the majority of the District Court below, this Court found that Due Process did not require the Administrator under the Fair Labor Standards Act, 29 U.S.C. §§201 *et seq.* to give notice and a hearing to every affected textile manufacturer prior to setting a minimum wage for its workers. Such hearings do not adjudicate individual facts such as those contemplated in the case at bar.

The other exception to the general principle occurs where an important governmental or public interest is at

stake, and exceptional circumstances require prompt action to deprive an individual of a property interest for a public benefit which would otherwise be lost. Such situations have been found to include the destruction, without prior notice and hearing, of possibly putrid food in order to prevent severe harm to consumers, *North American Cold Storage v. City of Chicago*, 211 U.S. 306, and the seizure, without prior notice and hearing, of drugs misbranded in a manner misleading and possibly harmful to consumers, *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594. See also, *Coffin Bros. & Co. v. Bennett*, 277 U.S. 29 (bank failure); *Ownbey v. Morgan*, 256 U.S. 94 (secure jurisdiction of a court).

It is the fundamental constitutional dictate of fairness which has required due process before deprivation of property interests in the diverse situations which this Court has considered over the years. The "brutal need" felt by the welfare recipient in *Goldberg v. Kelly*, 397 U.S. 254, 261, is not the measure that individuals must meet in order to have due process prior to deprivation of their property interest. Nor is it the balancing of interests between the individual and the government, since such balancing relates only to the *form* of the hearing and not whether one is required before deprivation occurs. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 570-571, ns. 7-8. The determining factor has been the absence or presence of a governmental or public emergency that can only be averted through prompt action. If such an emergency is present, hearings to determine the propriety of deprivation of property rights can be postponed; otherwise, the right to be heard must preceed. *Armstrong v. Manzo, supra; Fuentes v. Shevin, supra; Sniadach v. Family Finance Corp. of Bay View, supra; Bell v. Burson, supra; Goldberg v. Kelly, supra; United*

States v. Illinois Central Railroad Company, supra. Appellants contend that it is readily apparent that no such governmental emergency exists in the case at bar.

IV.

ONLY A PRIOR EVIDENTIARY HEARING WILL SATISFY DUE PROCESS SINCE THE INJURED WORKER'S INTEREST FAR OUTWEIGHS ANY OTHER INTERESTS

When a Fourteenth Amendment right is the subject of deprivation, and no supervening governmental emergency requires prompt action, the Due Process Clause must be satisfied prior to the deprivation. It is at this point that this Court has traditionally turned to the balancing of interests to determine exactly what process is due. *Cafeteria and Restaurant Workers Union, Local 743, AFL-CIO v. McElroy,* 367 U.S. 886, 895.

The majority in the District Court apparently found that the Due Process Clause was satisfied by Rule 13 in this case. (App. 52) However, the Court below did not analyze the interests of the parties in the discontinuance of workmen's compensation benefits. If one balances the interests in this case, it is clear that only a prior evidentiary hearing will meet the requirement of due process, and that the *ex parte* review by an employee of the Commission, without notice to the injured worker, which is all that is required by Rule 13, is not sufficient.

The interests of an injured worker and his family are, at the very least, pressing. Their major interest is in the uninterrupted receipt of benefits on which they have been forced to rely in meeting their daily needs. The average one month suspension (App. 37) surely represents grievous injury to a family that has been living on 66 and 2/3rds percent of its average weekly income, to a

maximum of $70 per week. Section 65.1-54, Code of Virginia of 1950, as amended. To a family budget which has been cut by one-third, a total stoppage—however brief—could easily be disastrous. Appellants in this case have a need for their compensation which is just as "brutal" as that of the welfare recipient in *Goldberg v. Kelly*, 397 U.S. 254, 261. The likelihood of their ability to live off of savings during the pendency of their cases is remote, especially in view of the length of time involved (from an average of one to possibly eight months (App. 37)). Even if one assumes that a worker will have some savings left after having lived for a length of time on workmen's compensation benefits of 66 and 2/3rds of his average weekly wage up to a maximum of $70 per week, this would not automatically distinguish him from the welfare recipient since an individual may still be eligible for welfare with as much as $400 in savings, (Section 304.3B, Volume II, Manual of Policy and Procedure, Virginia Department of Welfare and Institutions) and, therefore, still considered in brutal enough need to be afforded a prior evidentiary hearing. And it is clear that the State of Virginia recognizes the brutality of the need for workmen's compensation by exempting it from the reach of creditors, Section 65.1-82, Code of Virginia of 1950, as amended, just as it does for welfare, Section 63.1-88, Code of Virginia of 1950, as amended.

Even an injured worker's ability to resort to welfare to mitigate the crushing effects of this need on himself and his family is made extremely problematical by the fact that he must be either blind, 42 U.S.C. §§1201 *et seq.*, over 65 years of age, 42 U.S.C. §§1381 *et seq.*, raising a family without a spouse, 42 U.S.C. §§601 *et seq.* (since Virginia does not participate in the AFDC program for unemployed fathers, 42 U.S.C. §607),

permanently and totally disabled, 42 U.S.C. §§1351 *et seq.*, or fortunate enough to live in one of the counties or cities in Virginia that has a local General Relief program, Section 63.1-106, Code of Virginia of 1950, as amended. Since neither welfare nor savings are viable or realistic alternatives, the injured worker may be forced to return to work before he is physically ready in order to support his family and possibly further aggravate his physical condition.

The harm done to the injured worker may be irreparable in a very real sense: greater physical damage by going back to work too quickly; loss of all compensation by letting the hearing go by default; being forced by the economic pressure to accept less than a compensatory settlement; or suffering some severe blow to the economic stability of the family such as eviction or repossession.

> [T]ermination of aid pending resolution of a controversy over eligibility may deprive an eligible recipient of the very means by which to live while he waits.

Goldberg v. Kelly, 397 U.S. 254, 264. See also, *Sniadach v. Family Finance Corporation of Bay View*, 395 U.S. 337, 341-342.

Balanced against these interests and considerations are the interests of the insurer or employer, and, in a broader perspective, the interests of the government and consuming public. The insurer's or employer's interest lies in the increased financial burdens of paying compensation to those workers who are found to be no longer disabled, while hearings and decisions are pending. Under the present law in Virginia, Section 65.1-99, Code of Virginia of 1950, as amended, benefits paid cannot be recovered. This statute can, of course, be changed if the legislature

of Virginia feels it is important to do so. If the state refuses to permit an increase in the insurance rates, which are subject to its control, the insurance company's burden cannot be eased by passing the added expense on to the employers who would then pass it on to the public in the form of higher prices for goods or services.

The interest of the public is no less weighty, for realistically it is the public who will ultimately bear the expense resulting from increases in operating the compensation system.

The governmental interest does not come down wholly on one side or the other. Naturally there is the public's interest in having the most effective, least expensive and most efficient system of compensating injured workers. Nevertheless, as in the case of an *eligible* welfare recipient, *Goldberg v. Kelly*, 397 U.S. 254, 264, there is an important governmental interest in seeing that an injured worker who is still eligible for compensation is not mistakenly terminated. The broad humanitarian goals which the Court set out in *Goldberg* counseling for the uninterrupted aid to eligible welfare recipients, apply equally if not more strongly for injured workers. Also, there is the governmental interest in seeing that an injured worker recovers from his disability and returns to become a productive member of society. Protecting against his being forced back to work too early or being forced onto welfare obviously promotes this latter governmental interest.

This Court is asked to weigh the "claims upon which people rely in their daily lives" *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577, against an increased cost to the general public or less profit for some segments of the business community. When these factors have been put on the constitutional scale by the Court, there has

never been any doubt but that the individual's right to his "property" is much weightier.

> [T]he Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy.

Stanley v. Illinois, 405 U.S. 645, 656.

The analysis in the dissenting opinion in *Fuentes v. Shevin,* 407 U.S. 67, 97, merits detailed comparison with that of the case at bar, since it demonstrates that in this case the "practical considerations involved" weigh heavily in appellant's favor. The dissent is predicated on two basic propositions: first, that it is not in a seller's interest to act precipitously in instituting replevin since he will usually lose money by terminating the installment contract; and second, the kind of evidence and factual determinations required to settle the usual debtor-buyer vs. creditor-seller disputes are easily obtainable, since they involve no more than the question of whether "the debtor-buyer has either defaulted or he has not". *Fuentes v. Shevin, supra* at 100. (White, J. dissenting)

The case at bar presents a different situation entirely. First, the insurer's or employer's economic interest will almost always be served by suspending benefits and requesting a hearing when they have the slightest doubt as to a worker's eligibility. There will always be some workers who, although they are still disabled and therefore eligible, will not contest their claim. One can get an indication of the number of people whose benefits would not have to be paid by this attrition of those who "default" in this way, by the studies which have been

done on the huge percentage of "default judgments" which are obtained in our lower courts. *The Persecution and Intimidation of The Low-Income Litigant as Performed by the Small Claims Court in California,* 21 Stanford L.R. 1657, 1660 (1969); cf. *Fuentes v. Shevin,* 407 U.S. 67, 83, n. 13, indicating people's reluctance to enter such an arena. Second, the financial pressures which fall on the worker and his family once his source of income is discontinued, puts the insurer in a much better bargaining position to compel the acceptance of a "lump sum" settlement (Section 65.1-93, Code of Virginia of 1950, as amended) of a less than compensatory amount. Cf. *Sniadach v. Family Finance Corporation of Bay View,* 395 U.S. 337, 341. Therefore, the "dollars and cents" considerations indicate that the employer or insurer will gain significantly by acting to terminate benefits prior to a hearing, unlike the creditor-seller. *Fuentes v. Shevin,* 407 U.S. 67, 100 (White, J. dissenting)

Furthermore, the issues to be considered in "change of condition" hearings in workmen's compensation cases often involve conflicting and highly technical evidence, not the simple facts and findings required in the usual replevin situation. Most disputes are resolved by the medical evidence, and where there is a conflict of expert opinion in the evidence, the resolution of the dispute requires diligent evaluation and careful consideration. There are no typical situations such as the usual buyer-debtor versus seller-creditor relationship. *Fuentes v. Shevin,* 407 U.S. 67, 100 (White, J. dissenting). A cursory reading of any one of the volumes of the published Opinions of the Industrial Commission of Virginia (hereinafter referred to as OIC) will show that the likelihood of mistaken discontinuance of benefits, given the hard factual questions at issue, is "sufficiently real . . . [and] recurring to justify a broad constitutional

requirement", *Fuentes v. Shevin, supra* at 100 (White, J. dissenting), of a full prior evidentiary hearing.

The issues in "change of condition" hearings under Rule 13 are almost always such that a straightforward honest presentation of the evidence available to only one side will give probable cause to believe (under Rule 13) that the change has occurred. Often the insurer will have the report of one doctor stating that the worker is no longer disabled, while at a hearing another doctor's report will give the opposite conclusion. And since the insurer must meet the burden of proof, *J.A. Foust Coal Co. v. Messer,* 195 Va. 762, 80 S.E.2d 533 (1954), the worker will still be eligible. This of course is what happened to Mr. Dillard. (App. 13-16) See also, e.g. *Charles v. Aileen, Inc.*, 53 OIC 35 (August 25, 1971) (conflicting opinions of two orthopedists); *Collins v. Carpenter Construction Co., Inc.*, 53 OIC 43 (August 24, 1971) (conflicting medical opinions). Another common reason for insurers applying for a hearing is their belief that the worker has unjustifiably refused medical attention. Section 65.1-88, Code of Virginia of 1950, as amended. This also happened to Mr. Dillard. (App. 17) See also, e.g. *Baker v. Fairfax County School Board,* 53 OIC 11 (August 5, 1971) (failure to lose weight does not constitute unjustified refusal of medical treatment); *McAdoo v. Meadowbrook Country Club,* 53 OIC 175 (April 22, 1971) (failure to keep medical appointment justified since claimant lived alone with no one to care for her and went to mother's home out of state). Cf. *Dowell v. Pulaski Furniture Corp.*, 53 OIC 84 (May 11, 1971) (claimant did not unjustifiably refuse offered employment, Section 65.1-63, Code of Virginia of 1950, as amended).

In the above cases before the Commission, taken from just a six month period, as in those of appellants Dillard and Williams, compensation was received, then

terminated, and then restored after long periods of waiting without income, and only after a later due process hearing where these people were able to demonstrate that they were still eligible.

Since the questions to be decided in change of condition hearings to determine whether compensation is no longer due are issues of very individualized facts, the process which has traditionally been required is: meaningful and timely notice of the opportunity for a hearing; a hearing before an impartial fact finder at which there is an opportunity to present evidence in one's own behalf, and refute, by cross examination or otherwise, the evidence against you; and a decision based solely on the evidence adduced at the hearing. *Goldberg v. Kelly*, 397 U.S. 254, 267-271 (and cases cited therein).

The procedures in effect now under Rule 13 afford none of the above protections. There is no requirement at all of notice. Section 65.1-94, Code of Virginia of 1950, as amended. The letter which was sent to Mr. Williams (App. 75) gave him no meaningful information as to what the procedure which was being set in motion, was like, or what he could do to protect his interests if he disagreed. The time between the filing of the Application for Hearing and the finding of "probable cause" is not set out, and in Mr. Williams' case was so short (App. 75), that it was impossible for him to prepare his case with such things as additional medical examinations or tests. There is of course no hearing at all, and no opportunity for the injured worker to present evidence even if he had it readily at hand. Furthermore, there is no prohibition imposed on the person who determines "probable cause" from eliciting information on his own.

> [F]airness can rarely be obtained by secret, one-sided determination of facts, decisive of rights.

Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 170 (Frankfurther, J., concurring).

Only when an injured worker is afforded the above protections *before* his benefits are discontinued will he have been provided "those fundamental requirements of fairness which are of the essence of due process in a proceeding of a judicial nature." *Morgan v. United States*, 304 U.S. 1, 19.

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the court below should be reversed.

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